STATE OF MICHIGAN

COURT OF APPEALS

ERIC KORPAL and MARY KORPAL also known as MARY PITTS,

Plaintiffs-Appellants,

v

SAMUEL SHAHEEN, M.D., and MIDWESTERN SURGICAL ASSOCIATES,

Defendants-Appellees,

and

COVENANT HEALTHCARE, STEPHEN A. MESSANA, D.O., SCOTT CHANEY, M.D., and ADVANCED DIAGNOSTIC IMAGING, P.C.,

Defendants.

UNPUBLISHED
December 5, 2013

No. 309344
Saginaw Circuit Court
LC No. 03-049832-NH

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Plaintiffs, Eric and Mary Korpal, appeal as of right the jury trial verdict of no cause of action in this medical malpractice action against defendants, Samuel Shaheen, M.D., and Midwestern Surgical Associates. We affirm.

I. FACTUAL BACKGROUND

Plaintiff Eric Korpal suffered from acute acid reflux and his family doctor recommended a laparoscopic Nissen fundoplication procedure. Dr. Shaheen was the surgeon who performed the procedure, which involved wrapping part of the stomach around the esophagus and suturing it to itself and attaching it to the esophagus. While the procedure created a risk of perforation, Eric appeared to be recovering well after the surgery.

However, Eric soon began having symptoms indicative of a post-operative complication. While plaintiff's expert, Dr. Steven Swartz, employed by Forensic Medical Advisory Service, testified that Shaheen violated the standard of care in failing to diagnose a perforation sooner,

Shaheen and Dr. John Murphy, testing on behalf of defendants, disagreed. A perforation was eventually diagnosed, and Shaheen performed surgery to repair the leak.

The jury found in favor of defendants and that Shaheen did not behave negligently. After the verdict, plaintiffs filed a motion for a new trial or JNOV, asserting numerous grounds for the requested relief. Plaintiffs contended that the trial court erred in excluding a two-page document that had been disclosed in Eric's medical record, as this was not privileged peer review material. They also argued that the jury's verdict was against the great weight of the evidence. Plaintiffs then filed a supplemental brief in support of their motion for a JNOV or new trial, arguing that they recently discovered juror misconduct. Plaintiffs stated that they encountered one of the jurors, Donald Chaltraw, who informed them that another juror, Peter Bartels, used a handheld device during jury deliberations, aggressively fought to persuade the other jurors to find in favor of defendants, and had told the other jurors that Shaheen came from a good family. The trial court denied plaintiffs' motion for a new trial or JNOV. Plaintiffs now appeal.

II. STANDARD OF REVIEW

"This Court reviews de novo the trial court's decision on a motion for JNOV." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). We review all of the evidence and legitimate inferences in the light most favorable to the nonmoving party, and the motion should be granted only if the evidence failed to establish a claim as a matter of law. *Id.* at 491-492. A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

III. IMPEACHMENT EVIDENCE

Plaintiffs contend that the trial court improperly removed a two-page document from Eric's medical chart after it had been admitted without objection. Plaintiffs contend that the trial court's ruling caused irreparable harm because it constrained their ability to impeach Shaheen regarding his communications with a more senior surgeon. The two-page document consisted of a review and analysis of Eric's case, dated in August and September of 2002, well after the surgery in January of 2002. This document included a summary of what happened, recommendations, as well as a statement that the "general surgery section chief, will speak to attending surgeon, Dr. 2544, about this case and the recommendations as noted above."

At trial, plaintiffs asked Shaheen the following questions:

> *Q.* How about after this January surgery, January 9th, did you consult with a more senior surgeon to talk about the case?
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> *A.* I'm sure I talked about it with somebody, but I didn't ask for an official consult, no, because he was getting better at that time.

> *Q.* Did anybody – did anybody – did you seek out or did anybody come volunteer assistance to you that you should have done this or should have done that while – the interim time period between January 3rd and January 9th?
>
> *A.* I don't believe so, no.
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> ***
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> *Q.* You indicate that – that no more-experienced or senior surgeon ever counseled you about Mr. Korpal. Didn't, in fact, the senior chief of surgery talk to you about your care and treatment of Eric Korpal?
>
> *A.* I don't believe so, no.

When plaintiffs attempted to ask Shaheen about the two-page document, defendants objected, and the trial court agreed that this document should be excluded. When plaintiffs again raised this issue in their motion for a new trial or JNOV, the trial court found that regardless of the peer review statutes, this line of questioning involved impeaching a witness with extrinsic evidence on a collateral matter, which is not permitted.

MRE 608(b) generally "prohibits impeachment of a witness on collateral matters." *Int'l Union, United Auto, Aerospace & Agric Implement Workers of America v Dorsey*, 273 Mich App 26, 35; 730 NW2d 17 (2006); see also *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007). Thus, impeachment based on extrinsic evidence regarding collateral, irrelevant, or immaterial matters is generally forbidden. *Int'l Union*, 273 Mich App at 35. Nevertheless, "a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness's statements." *Id.*

In the instant case, when asked if he consulted with a more senior surgeon after the January 9th surgery, Shaheen replied that he was sure he talked to someone about it, but that he did not ask for an official consult. When further questioned about whether "anybody . . . volunteer[ed] assistance" regarding what he should have done or whether "the senior chief of surgery talk[ed]" to him about his "care and treatment" of Eric, Shaheen replied that he did not believe so. In terms of impeaching Shaheen, the two-page document did not demonstrate that Shaheen had provided untruthful testimony. Shaheen acknowledged that he had spoken to someone about his treatment of Eric, but believed it was not the chief of surgery. Furthermore, this issue was collateral. Who Shaheen had a conversation with, months after the surgery, was not germane to the issue of whether his post-operative treatment of Eric was within the standard of care.[1]

[1] Without citation to authority, plaintiffs argue that "credibility of a witness, especially the Defendant doctor in a medical malpractice action, is never a collateral issue." However, this Court has held that "[c]ross-examination may be denied with respect to collateral matters bearing

Moreover, any error in the exclusion of this document was harmless beyond a reasonable doubt. MCR 2.613. As discussed above, this document did not demonstrate that Shaheen was providing untruthful testimony. Furthermore, plaintiffs conducted a thorough cross-examination of Shaheen and questioned him regarding his decisions and behavior during Eric's hospital stay. Plaintiffs also produced lengthy expert testimony from Swartz regarding the alleged failure of Shaheen to meet the standard of care. In light of the extensive evidence and arguments plaintiffs produced, we find that the exclusion of this two-page document was not "inconsistent with substantial justice." MCR 2.613.

IV. GREAT WEIGHT OF THE EVIDENCE

Plaintiffs next argue that reversal is required because the verdict was against the great weight of the evidence. "When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses." *Allard*, 271 Mich App at 406-407. As the Michigan Supreme Court has cautioned, a jury's verdict must be upheld "'even if it is arguably inconsistent, if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" *Id.* at 407, quoting *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000). A verdict may be overturned on a great weight challenge only if the verdict was "manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (quotation marks and citation omitted). The trial court cannot substitute its judgment for that of the jury. *Id.*

Significant evidence supports the jury's verdict. Swartz, plaintiffs' expert, testified that on January 5th, Eric was displaying symptoms of a post-operative complication, and Shaheen correctly ordered a stat CT scan with PE (pulmonary embolism) protocol. The CT scan ruled out a pulmonary embolism, although there was fluid in Eric's lungs, leading Shaheen to conclude that Eric was not taking deep enough breaths. While Swartz approved of Shaheen's subsequent decision to order an upper GI with Gastrografin, Swartz claimed that Shaheen should have ordered it on a stat basis. Yet, defendant's expert, Murphy, testified that the standard of care did not require this test to be completed on the 5th.

In regard to January 6th, the upper GI was performed, and the radiologist diagnosed an esophageal obstruction, as contrast had collected at the GE (gastroesophageal) junction. Swartz testified that this was not helpful in diagnosing a leak in the stomach, but Murphy explained that the signs were pointing toward an obstruction at the GE junction. Murphy explained that he would have concluded that the problem was the wrap had been too tight, especially as there were no signs of extravasation, the esophagus did not show any evidence of a leak or perforation, and the NG (nasogastric) tube could not be inserted into the stomach.

Shaheen then performed the EGD (esophagogastroduodenoscopy) and was able to pass the scope through the GE junction, relieve the obstruction, and evaluate approximately 98

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only on general credibility, as well as on irrelevant issues." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992) (citations omitted).

percent of the stomach. While Swartz testified that the EGD was appropriate, he claimed that Shaheen should have gone even further to diagnose a leak, as there was no obstruction and the wrap was not too tight. Shaheen disagreed, as did Murphy. Murphy testified that there was no evidence of a leak at this point because although Eric had an elevated heart rate, his white blood count was not elevated nor did he have a fever. Especially after the EGD, Murphy testified that Shaheen had examined the esophagus and most of the stomach, and found no signs of a leak. He also testified that Shaheen had an explanation for Eric's symptoms, which was pneumonia based on the pulmonary symptoms Eric was exhibiting. Murphy further testified that a surgeon would want evidence of a leak before operating, as surgery may kill the patient.

On January 7th, Eric was afebrile, his blood pressure was elevated, and there were decreased breath sounds on the left side of Eric's chest. Based on these symptoms, Shaheen thought the problem was pneumonia or atelectasis and ordered a number of different tests. A CT scan revealed that there was moderate left pleural effusion and the radiologist's report indicated that there was no indication of extravasation or perforation. While Swartz testified that Shaheen should have ordered the CT scan with a leak protocol, Murphy testified that he had never heard of that. Murphy also testified that he would expect a CT scan of the abdomen and pelvis with an oral contrast to show the leak.

According to Swartz, a reasonable surgeon should have questioned the radiologist regarding what other tests could be performed. Murphy, however, testified that the left pleural effusion was indicative of developing pneumonia. He also testified that there was no indication of mediastinal air in the CTs on the 5th or 7th, which would have been evidence of a leak. Murphy further testified that it was reasonable for Shaheen to rely on Chaney's radiologist report from the 7th, which concluded that there was no perforation.

On January 9th, a different radiologist interpreted the previous CT scans and conducted and upper GI, diagnosing a perforation. Even Swartz acknowledged that Shaheen now had conflicting radiologist reports about whether the CTs from the 5th and 7th showed signs of a leak. At that point, Shaheen then performed surgery to repair the leak.

On appeal, plaintiffs contend that the jury's finding that Shaheen did not violate the standard of care was against the great weight of the evidence. Plaintiffs essentially are arguing that the jury should have believed Swartz, not Murphy or Shaheen. However, "[i]t is the jury's responsibility to determine the credibility and weight of the trial testimony. The jury has the discretion to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted, and we must defer to the jury on issues of witness credibility[.]" *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008) (citations omitted). Further, Murphy and Shaheen detailed the extensive analysis, tests, and treatment that Shaheen performed in his continual effort to correlate Eric's symptoms with a diagnosis. Because competent evidence supports the jury's verdict, we reject plaintiffs' claim of error. *Allard*, 271 Mich App at 406-407. This is especially true as the "trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by the appellate court." *Arrington v Detroit Osteopathic Hosp Corp*, 196 Mich App 544, 560; 493 NW2d 492 (1992).

V. JUROR MISCONDUCT

Plaintiffs contend that a new trial is warranted because of juror misconduct. Once the jury has been polled and discharged, "testimony and affidavits by the jury members may only be used to challenge the verdict with regard to extraneous matters, like undue influence, or to correct clerical errors in the verdict in matters of form." *Put v FKI Indus, Inc*, 222 Mich App 565, 569; 564 NW2d 184 (1997). While juror misconduct may require a new trial under certain circumstances, it is not warranted in every instance. *Unibar Maint Servs, Inc v Saigh*, 283 Mich App 609, 627; 769 NW2d 911 (2009). Jurors can consider only evidence presented to them in open court. *Id.* "In order to establish that extraneous facts not introduced into evidence influenced the jury and requires a new trial, a defendant must show (1) that the jury was an exposed to an extraneous influence and (2) that the influence created a real and substantial possibility [it] could have affected the jury's verdict." *Id.* (quotation marks and citation omitted). Moreover, "[w]ith respect to the second element, a defendant must demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* (quotation marks and citation omitted).

Plaintiffs have not satisfied this two-prong test. The allegation concerning the handheld device is neither specific enough nor serious enough to meet the elements of the test articulated above. While Chaltraw alleged that Bartels used a handheld device, there is no evidence of what, if any, information Bartels obtained from the device and then communicated to the other jurors. Thus, there is no basis to conclude that extraneous evidence was introduced and substantially related to a material aspect of the case. *Unibar Maint Servs, Inc*, 283 Mich App at 627.

The only remaining allegation from Chaltraw's affidavit that could constitute an extraneous influence is that Bartels told the rest of the jury that Shaheen came from a "good family." Even assuming that this was an extraneous influence, plaintiffs have not demonstrated that it was substantially related to a material aspect of the case or that there was a direct connection between the extrinsic material and the adverse verdict. *Unibar Maint Servs, Inc*, 283 Mich App at 627. Bartels opinion that Shaheen came from a good family does not rise to the level of juror misconduct, as it was not relevant to the decision the jury was charged with, and there is no evidence that it influenced the jury's verdict. Therefore, the trial court properly denied plaintiffs' motion for a new trial based on alleged juror misconduct.

VI. CONCLUSION

There are no errors requiring reversal in the trial court's exclusion of the two-page document with which plaintiffs attempted to impeach Shaheen. Further, the verdict was not against the great weight of the evidence and there were no instances of juror misconduct requiring reversal. We affirm.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan